IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

WILLIAM F. WILLOUGHBY,

Petitioner,

v.

H. GUYFORD STEVER, Director of the National Science Foundation,

and

FRED BETZ, DALE ATKINS, JOSEPH COORS, BYRON JOHNSON, HARRY CARLSON, ROBERT GILBERT, as the Board of Regents of the University of Colorado,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William F. Willoughby, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on the 23rd day of October, 1974.

OPINION BELOW

The opinion of the Court of Appeals below is not yet reported. It affirmed the judgment of the District Court in its non-reported opinion sustaining the motion to dismiss of the respondent. As the motion to dismiss was based on a prior memorandum opinion of the District Court, denying the application of petitioner for a three judge Court, this non-reported memorandum and order, dated 25 August, 1972 is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on the 23rd of October, 1974. Motion to extend time for issuance of mandate for thirty days to prepare appeal was denied the 22nd day of November, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court below err in refusing to permit the respondent to prove that the Government was deliberately hostile to the religion of the respondent and further prove that the Government was establishing an official Government religion or nonreligion.

2. Whether the ruling of this Court in *Epperson v. Arkansas*, 393 U.S. 97 which held that the prohibition of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise there of mandates governmental neutrality between religion and religion, and between religion and nonreligion; neither a state nor the Federal Government can pass laws which

aid one religion, aid all religions, or prefer one religion over another, specifically applies to the teaching that man evolved from lower animals; applies to the instant situation wherein it is presumed that the Government is promulgating this teaching as a deliberate hostile act against the religion of the respondent to destroy said religion and to supplant said religion with an official Government religion of nonreligion.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT I

"Congress shall pass no law respecting the establishment of religion or prohibiting the free exercise thereof; * *"

STATUTE AND REGULATIONS INVOLVED

The statute involved is the National Science Foundation Act of 1950, 42 U.S.C. 1861, *et seq.*, certain of the text being cited in the memorandum and order, Appendix A, at page 4.

The offending regulations are not available yet in this case because of a protective order denying access to them by the District Court.

STATEMENT

The petitioner filed a complaint in which he alleged the government had used the National Science Foundation Act to base an attack on the religion of the respondent and to establish an official government position of nonreligion. The device employed was a text book for which the government expended an initial sum of over seven million

($7,000,000.00) dollars. The means employed to achieve the prohibited end was to deliberately exclude any scientist from contributing to the book that had an opinion contrary to the government view. The end result is a text book, identified as an official product of the government, which teaches as a fact, certain evolution principles, which have been proven false by recently discovered hard scientific evidence by such distinguished scientists as Richard Leakey, Director of National Museums of Kenya and others.

The courts below have reacted in summary manner to this complaint. The District Court refused discovery of the offending government regulations that excluded scientific views incompatible with the unlawful objective of the government. The Court further refused designation of a three judge Court. In refusing to permit the designation of a three judge Court, the Court adopted certain statements of the respondent made in opposition to the appointment of the three judge Court which were dispositive of the matter without permitting the respondent to present either law or evidence to support the complaint.

The District Court gave no reason whatever when it sustained the respondent's motion to dismiss.

The Court of Appeals gave no reason whatever when it affirmed the District Court in refusing a three Judge Court and later when the District Court summarily sustained the motion to dismiss, the Appeals Court again stated no reason whatever.

The Rules of the Appellate Court below, require the Court to accept all facts alledged in a complaint as proven in the most favorable interpretation to sustain a complaint,

before it may dismiss an action without trial. *Embassy Dairy v. Camalier*, 211 F.2d 41 (1954). The Courts below are therefore ruling that regardless of the fact that the government is committing deliberate hostile acts against religion and is further setting up its own official religion, the Courts will do nothing.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

This case is a First Amendment, religious freedom case. This Court has consistently held that the Government must be neutral in religious matters. A definitive case stating the rules of the Supreme Court that the Appeals Court conflicts with is *Lemon et al. v. Kurtzman, et al.*, 403 U.S. 602. This case states, regardless of the stated intent of an Act, no monies may be spent to promulgate one religion and be hostile to another. At page 613 the Court said, "Inquiry into legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by compulsory attendance laws. There is no reason to believe the legislature meant anything else. The Court holding the Acts unconstitutional because a small portion of funds had religious purposes, said, "We said in unequivocal words in *Everson v. Board of Education*, 330 U.S. 1, 16, 'No tax in any amount large or small, can be levied to support any religious activities or institutions whatever they may be called, or whatever

form they may adopt to teach or practice religion.' We reiterated the same idea in *Zorach v. Clauson*, 343 U.S. 306, 314 and in *McGowan v. Maryland*, 366 U.S. 420, 443, and in *Torasco v. Watkins*, 367 U.S. 488, 493. We repeated the same idea in *McCullum v. Board of Education*, 333 U.S. 203, 210, and added that a State's tax-supported public schools could not be used for the dissemination of religious doctrines.' * *"

The Appeals Court had departed from the most unequivocal words this Court has ever used in ruling that in effect, regardless of the assumed proven fact that the Government is using tax funds for religious purposes, there can be no relief. If this decision is permitted to stand, it will reverse all of the prior decisions of this Court on this important matter and establish the basis for an official religion of the United States and further provide authority for the Government to abolish all other religions.

CONCLUSION

The judgment below is a unique departure from decisions of this Court which require neutrality of the Government in religious matters. As such it represents destruction of the First Amendment of the Constitution. The issue of what the Government may promulgate in textbooks is one of the most compelling contemporary issues. To permit the Government to promulgate as fact, a theory of the origin of man, as an article of faith which is inconsistent with scientific data, is anathma to the Constitution. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

Of Counsel:

DANIEL D. SMITH
1441 Rhode Island Ave., N.W.
Washington, D.C.

JAMES L. FISK
4610 Rodman, N.W.
Washington, D.C.
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM P. WILLOUGHBY, :
:
Plaintiff, :
:
v. : Civil Action No. 1574-72
:
H. GUYFORD STEVER, et al, :
:
Defendants. :

MEMORANDUM AND ORDER

Plaintiff as a "tax paying citizen" seeks declaration that the National Science Foundation Act of 1950 (hereinafter referred to as the Act), 42 U.S.C. 1861, et seq, does not permit the National Science Foundation to fund a project whose purpose is to create biology textbooks for children where those textbooks present the Darwinian theory of evolution as the only credible theory of the orgin of man. Alternatively, the plaintiff seeks a declaration that the Act is unconstitutional if it permits the funding of this project.

Plaintiff further asks the Court to request that a three-judge court be empaneled to hear this case pursuant to 28 U.S.C. 2282-84. The Federal defendant, the Director of the National Science Foundation, opposes the convening of such a Court on the ground that such a panel is not required to grant the relief plaintiff seeks under §2282 and on the

further ground that the constitutional question which the plaintiff poses is plainly insubstantial because it raises no issues not conclusively determined by the Supreme Court at this time. The defendant, at this juncture, does not address himself to the merits of the declaratory relief sought by the plaintiff.

A single district judge, to whom a request is made for the convening of a three-judge court is not automatically required to pass that request on to the Chief Judge of the Circuit. The weight of authority holds that the District Court exercises a judicial function under 28 U.S.C. 2284, and need not make the request to the Chief Judge, if it finds (1) that the Court lacks jurisdiction over the action, (2) that the technical requirements of the three-judge statute are not met, or, (3) that no substantial constitutional question is presented. Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962); Lion Manufacturing Co. v. Kennedy, 330 F.2d 833, 840, 841 (D.C.Cir., 1964); Maryland Citizens v. Governor of Maryland, 429 F.2d 606, 611 (4th Cir. 1970); Weir v. United States, 310 F.2d 149, 151-153 (8th Cir., 1962).

It is clear that the declaratory relief which plaintiff here seeks does not require that a three-judge court be convened. 28 U.S.C. 2282 is a limitation on the injunctive power of the Federal Courts and requires that such a court be convened only when injunctive relief is sought, interdicting the operation of a Federal statute.

Flemming v. Nestor, 363 U.S. 603, 607 (1960). Since the plaintiff asks no such relief, this Court is not bound by the limitations of §2282 and could act alone if so inclined.

Even if the Court were to accept the plaintiff's claim to a hearing before a three-judge panel under §2282-4, it would still be compelled to refuse to request the Chief Judge for such a panel because of the insubstantiality of the alleged constitutional issue posed by the plaintiff.

Insofar as is pertinent here, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." While the thrust of the plaintiff's constitutional argument is hidden within the imprecise language employed, it is clearly his contention that the Act is violative of either the "establishment clause" of the First Amendment or the succeeding "free exercise clause."

Recent decisions by the Supreme Court have established that four criteria are relevant to the question of whether a statute is in conflict with the First Amendment.

"First does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?" Tilton v. Richardson, 403 U.S. 672, 678 (1971).

We address ourselves to those questions seriatim.

With respect to the first question one need look no further than the language of the statute under which funding of the Biological Sciences Curriculum Study (BSCS) was authorized to find the clearest possible indication of the secular purpose behind the legislation. 42 U.S.C. §1862 (a)(1) provides:

> (a) The Foundation is authorized and directed
> (1) To initiate and support basic scientific research and programs to strengthen scientific research potential in the mathematical, physical, medical, biological, engineering, social and other sciences, by making contracts or other arrangements (including grants, loans, and other forms of assistance) to support such scientific activities and to appraise the impact of research upon industrial development and upon the general welfare.

The BSCS project was funded by the National Science Foundation in accordance with this announced statutory goal of ". . . strengthen[ing] scientific research potential in the . . . biological . . . sciences." This is certainly a "secular purpose" within the meaning of Tilton. There is no mention of anything which is even remotely related to the support or inhibition of religion.

We turn to the second question. It is the plaintiff's apparent contention that the Act does not maintain religious neutrality because it authorizes the publication of the Darwinian evolutionary theory in a project funded under the Act -- as opposed to a theory of divine creation, to which he adheres -- as the only credible explanation of the origin of man. While the Court does not necessarily agree that the

two theories are mutually exclusive, it will assume arguendo that a scientific theory can be "hostile" to a religious belief rather than merely contrary to it.

That step taken, the Court examines the plaintiff's contention that the dissemination of this course material inhibits the exercise of his religious beliefs. Even if this inhibition is an "effect" of the policy pursued by the Act it is hardly a "primary effect" within the meaning of Tilton. A secular policy may affect preferences among or impose burdens on religions in the necessary and proper achievement of secular goals such as those the instant legislation undertakes to achieve without offending the Constitution. McGowan v. Maryland, 366 U.S. 420, 442 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961).

As to the third question posed by Tilton, supra, it is clear that the administration of the legislation in question involves no excessive entanglement with religion. The statute imposes no religious requirements. The National Science Foundation awards grants under its "Pre-College Curriculum and Instruction Development Program" on the basis of proposals submitted by interested applicants. The plaintiff does not allege, and the Court sees no reason to assume, that the Foundation imposes any religious requirements on the funding of these proposals or that there is any interference by the agency, religious in nature, in the content of publications funded under this program. Certainly, where, as here,

the federal agency maintains minimal contact with the recipients of federal funds after the proposal has been approved there is little likelihood of government entanglement with religion. See Tilton v. Richardson, supra at 688 (1971).

And finally there is no showing that the implementation of the Act inhibits the free exercise of religion in violation of the First Amendment. Plaintiff claims that he is coerced to pay taxes to support anti-religious acts which run contrary to his belief that man was created by God. Plaintiff, however, does not allege any coercion directed at the practice or exercise of his beliefs. See Tilton v. Richardson, supra at 672. Clearly, the implementation of the instant legislation is in no way concerned with controlling the content of federally-funded publications or imposing sanctions against those opposed to views expressed in these publications.

In fact, this controversy does not revolve around a legal statement of the unconstitutionality of this Act as written and applied. Rather, it is a complaint that the Act has produced a result inconsistent with the plaintiff's religious beliefs. It is clear that any relief this Court might grant the plaintiff would be a proscription of a valid governmental function in deference to the religious beliefs he holds. The Court would hold that such relief in itself would be violative of the First Amendment. Madeiros v. Kiyosaki 478 P.2d 314, 317 (Hawaii, 1970). "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." Epperson v. Arkansas 393 U.S. 97,106. (1968).

Having considered the pleadings, the memoranda submitted by the parties, and in light of the discussion and findings above, the Court concludes that a three-judge District Court is not required to hear this action. It is accordingly

ORDERED this 25th day of August, 1972, that the plaintiff's application for the convening of a three-judge District Court is denied.

Judge

426 U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-660

WILLIAM F. WILLOUGHBY,

Petitioner,

v.

H. GUYFORD STEVER, Director of the National Science Foundation,

and

FRED BETZ, DALE ATKINS, JOSEPH COORS, BYRON JOHNSON, HARRY CARLSON, ROBERT GILBERT, as the Board of Regents of the University of Colorado,

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OPINION BELOW

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QUESTIONS PRESENTED

1. Did the Court below err in refusing to permit the petitioner to prove that the Government was deliberately hostile to the religion of the respondent and further prove that the Government was establishing an official Government religion or nonreligion.

2. Whether the ruling of this Court in *Epperson v. Arkansas*, 393 U.S. 97 which held that the prohibition of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise thereof mandates governmental neutrality between religion and religion, and between religion and nonreligion; neither a state nor the Federal Government can pass laws which

aid one religion, aid all religions, or prefer one religion over another, specifically applies to the teaching that man evolved from lower animals; applies to the instant situation wherein it is presumed that the Government is promulgating this teaching as a deliberate hostile act against the religion of the petitioner to destroy said religion and to supplant said religion with an official Government religion of nonreligion.

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AMENDMENT I

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The courts below have reacted in summary manner to this complaint. The District Court refused discovery of the offending government regulations that excluded scientific views incompatible with the unlawful objective of the government. The Court further refused designation of a three judge Court. In refusing to permit the designation of a three judge Court, the Court adopted certain statements of the respondent made in opposition to the appointment of the three judge Court which were dispositive of the matter without permitting the petitioner to present either law or evidence to support the complaint.

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The Appeals Court had departed from the most unequivocal words this Court has ever used in ruling that in effect, regardless of the assumed proven fact that the Government is using tax funds for religious purposes, there can be no relief. If this decision is permitted to stand, it will reverse all of the prior decisions of this Court on this important matter and establish the basis for an official religion of the United States and further provide authority for the Government to abolish all other religions.

CONCLUSION

The judgment below is a unique departure from decisions of this Court which require neutrality of the Government in religious matters. As such it represents destruction of the First Amendment of the Constitution. The issue of what the Government may promulgate in textbooks is one of the most compelling contemporary issues. To permit the Government to promulgate as fact, a theory of the origin of man, as an article of faith which is inconsistent with scientific data, is anathema to the Constitution. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

Of Counsel:

DANIEL D. SMITH
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JAMES L. FISK
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Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM F. WILLOUGHBY,	:	
Plaintiff,	:	
v.	:	Civil Action No.
H. GUYFORD STEVER, et al.,	:	1574-72
Defendants.	:	

MEMORANDUM AND ORDER

Plaintiff as a "tax paying citizen" seeks declaration that the National Science Foundation Act of 1950 (hereinafter referred to as the Act), 42 U.S.C. 1861, *et. seq.*, does not permit the National Science Foundation to fund a project whose purpose is to create biology textbooks for children where these textbooks present the Darwinian theory of evolution as the only credible theory of the origin of man. Alternatively, the plaintiff seeks a declaration that the Act is unconstitutional if it permits the funding of this project.

Plaintiff further asks the Court to request that a three-judge court be empaneled to hear this case pursuant to 28 U.S.C. 2282-64. The Federal defendant, the Director of the National Science Foundation, opposes the convening of such a Court on the ground that such a panel is not required to grant the relief plaintiff seeks under §2282 and on the further ground that the constitutional question which the plaintiff poses is plainly insubstantial because it raises no issues not conclusively determined by the Supreme Court at this time. The defendant, at this juncture, does not address himself to the merits of the declaratory relief sought by the plaintiff.

A single district judge, to whom a request is made for the convening of a three-judge court is not automatically required to pass that request on to the Chief Judge of the Circuit. The weight of authority holds that the District Court exercises a judicial function under 28 U.S.C. 2284, and need not make the request to the Chief Judge, if it finds (1) that the Court lacks jurisdiction over the action, (2) that the technical requirements of the three-judge statute are not met, or, (3) that no substantial constitutional question is presented. *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Lion Manufacturing Co. v. Kennedy*, 330 F.2d 833, 840, 841 (D.C. Cir., 1964); *Maryland Citizens v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970); *Weir v. United States*, 310 F.2d 149, 151-153 (8th Cir., 1962).

It is clear that the declaratory relief which plaintiff here seeks does not require a three-judge court be convened. 28 U.S.C. 2282 is a limitation on the injunctive power of the Federal Courts and requires that such a court be convened only when injunctive relief is sought, interdicting the operation of a Federal statute. *Fleming v. Nestor*, 363 U.S. 603, 607 (1960). Since the plaintiff asks no such relief, this Court is not bound by the limitations of §2282 and could act alone if so inclined.

Even if the Court were to accept the plaintiff's claim to a hearing before a three-judge panel under §2282-4, it would still be compelled to refuse to request the Chief Judge for such a panel because of the insubstantiality of the alleged constitutional issue posed by the plaintiff.

Insofar as is pertinent here, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

. . ." While the thrust of the plaintiff's constitutional argument is hidden within the imprecise language employed, it is clearly his contention that the Act is violative of either the "establishment clause" of the First Amendment or the succeeding "free exercise clause."

Recent decisions by the Supreme Court have established that four criteria are relevant to the question of whether a statute is in conflict with the First Amendment.

"First does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?" *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

We address ourselves to those questions seriatim.

With respect to the first question one need look no further than the language of the statute under which funding of the Biological Sciences Curriculum Study (BSCS) was authorized to find the clearest possible indication of the secular purpose behind the legislation. 42 U.S.C. §1862(a)(1) provides:

> (a) The Foundation is authorized and directed
>
> (1) To initiate and support basic scientific research and programs to strengthen scientific research potential in the mathematical, physical, medical, biological, engineering, social and other sciences, by making contracts or other arrangements (including grants, loans, and other forms of assistance) to support such scientific activities and to appraise the impact

of research upon industrial development and upon the general welfare.

The BSCS project was funded by the National Science Foundation in accordance with this announced statutory goal of ". . . strengthen[ing] scientific research potential in the . . . biological . . . sciences." This is certainly a "secular purpose" within the meaning of *Tilton*. There is no mention of anything which is even remotely related to the support or inhibition of religion.

We turn to the second question. It is the plaintiff's apparent contention that the Act does not maintain religious neutrality because it authorizes the publication of the Darwinian evolutionary theory in a project funded under the Act — as opposed to a theory of divine creation, to which he adheres — as the only credible explanation of the origin of man. While the Court does not necessarily agree that the two theories are mutually exclusive, it will assume *arguendo* that a scientific theory can be "hostile" to a religious belief rather than merely contrary to it.

That step taken, the Court examines the plaintiff's contention that the dissemination of this course material inhibits the exercise of his religious beliefs. Even if this inhibition is an "effect" of the policy pursued by the Act it is hardly a "primary effect" within the meaning of *Tilton*. A secular policy may affect preference among or impose burdens on religions in the necessary and proper achievement of secular goals such as those the instant legislation undertakes to achieve without offending the Constitution. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961).

As to the third question posed by *Tilton, supra*, it is clear that the administration of the legislation in question

involves no excessive entanglement with religion. The statute imposes no religious requirements. The National Science Foundation awards grants under its "Pre-College Curriculum and Instruction Development Program" on the basis of proposals submitted by interested applicants. The plaintiff does not allege, and the Court sees no reason to assume, that the Foundation imposes any religious requirements on the funding of these proposals or that there is any interference by the agency, religious in nature, in the content of publications funded under this program. Certainly, where, as here, the federal agency maintains minimal contact with recipients of federal funds after the proposal has been approved there is little likelihood of government entanglement with religion. *See Tilton v. Richardson, supra,* at 688 (1971).

And finally there is no showing that the implementation of the Act inhibits the free exercise of religion in violation of the First Amendment. Plaintiff claims that he is coerced to pay taxes to support anti-religious acts which run contrary to his belief that man was created by God. Plaintiff, however, does not allege any coercion directed at the practice or exercise of his beliefs. *See Tilton v. Richardson, supra* at 672. Clearly, the implementation of the instant legislation is in no way concerned with controlling the content of federally-funded publications or imposing sanctions against those opposed to views expressed in these publications.

In fact, this controversy does not revolve around a legal statement of the unconstitutionality of this Act as written and applied. Rather, it is a complaint that the Act has produced a result inconsistent with the plaintiff's religious beliefs. It is clear that any relief this Court might grant

the plaintiff would be a proscription of a valid governmental function in deference to the religious beliefs he holds. The Court would hold that such relief in itself would be violative of the First Amendment. *Madeiros v. Kiyosaki*, 478 F.2d 314, 317 (Hawaii, 1970). "There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of a religious sect or dogma." *Epperson v. Arkansas*, 293 U.S. 97, 106 (1968).

Having considered the pleadings, the memoranda submitted by the parties, and in light of the discussion and findings above, the Court concludes that a three-judge District Court is not required to hear this action. It is accordingly

ORDERED this 25th day of August, 1972, that the plaintiff's application for the convening of a three-judge District Court is denied.

/s/ signature illegible
Judge

EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1916 September Term, 1974

Civil Action 1574-72

William F. Willoughby,
Appellant

v.

H. Guyford Stever,
Director of National Science Foundation

HUGH E. KLINE

Before: Tamm and MacKinnon, Circuit Judges; and *Merhige, United States District Judge for the Eastern District of Virginia.

ORDER

On consideration of appellant's motion to delay issuance of mandate, it is

ORDERED by the Court that appellant's aforesaid motion is denied.

Per Curiam

For the Court:

HUGH E. KLINE, Clerk

Robert A. Bonner

By:
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(d).

EXHIBIT B

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1916

September Term, 19 74
Civil 1574-72

William F. Willoughby, Appellant

v.

H. Guyford Stever,
Director of National Science Foundation,
et al

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 23 1974

HUGH E. KLINE
CLERK

Appeal from the United States District Court for the District of Columbia.

Before: Tamm and MacKinnon, Circuit Judges and Merhige,* United States District Judge for the Eastern District of Virginia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment----------of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

Hugh E. Kline
Clerk

Date: October 23, 1974

*Sitting by designation pursuant to 28 U.S.C. § 292(d)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-660

WILLIAM F. WILLOUGHBY, PETITIONER

v.

H. GUYFORD STEVER, DIRECTOR OF THE NATIONAL SCIENCE FOUNDATION

AND

FRED BETZ, DALE ATKINS, JOSEPH COORS, BYRON JOHNSON, HARRY CARLSON, ROBERT GILBERT, AS THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner brought suit against the Director of the National Science Foundation and members of the Board of Regents of the University of Colorado to enjoin implementation of the National Science Foundation Act of 1950, 64 Stat. 149, as amended, 42 U.S.C. 1861-1875, and to require respondents to withdraw from publication a series of biology textbooks. The books were prepared by the Biological Sciences Curriculum Study (BSCS), a private organization, through a grant to the University of Colorado by the National Science Foundation. Petitioner alleges that these books present Darwin's theory of evolution as "the only credible explanation of the origin

of man"; that this theory is contrary to petitioner's religious belief in the "creation theory"; and that presentation of the theory of evolution constitutes a violation of the First Amendment. Petitioner asserts that the National Science Foundation could not constitutionally provide any assistance to the publication of the textbooks.

The district court granted respondents' motions to dismiss, holding that under the four tests enunciated in *Tilton* v. *Richardson,* 403 U.S. 672, 678, neither the National Science Foundation Act nor its implementation by respondents was in conflict with the First Amendment (Supp. Pet. App. A1-A6). The court of appeals affirmed *per curiam* (Supp. Pet. App. Exhibit B).

2. The decision of the court below is correct and no issue warranting further review is presented.

Funding of the textbooks by the National Science Foundation is authorized by 42 U.S.C. 1862. *Tilton* v. *Richardson, supra,* sets out four criteria to consider to determine whether a statute is in conflict with the First Amendment:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion? [403 U.S. at 678.]

Under these criteria, there has been no violation of the First Amendment in this case.

First, the purposes of the National Science Foundation Act and of the BSCS are purely secular. 42 U.S.C. 1862(a)(1) sets out the purpose of the National Science Foundation:

> [T]o initiate and support basic scientific research and programs to strengthen scientific research potential in the mathematical, physical, medical, biological, engineering, social and other sciences, by making contracts or other arrangements (including grants, loans, and other forms of assistance) to support such scientific activities and to appraise the impact of research upon industrial development and upon the general welfare.

The court found that BSCS was funded by the National Science Foundation in accordance with this announced statutory goal of "strengthen[ing] scientific research potential in the * * * biological * * * sciences."

Second, the primary effect of the Act is neither to advance or inhibit religion. The primary effect of presenting the theory of evolution in a biology textbook is neither to inhibit nor advance religion, but rather to present scientific knowledge and theories to students. Any incidental effect on religion in such a situation is constitutionally permissible. See *McGowan* v. *Maryland,* 366 U.S. 420, 442; *Two Guys* v. *McGinley,* 366 U.S. 582.

Third, this case does not involve excessive entanglement with religion. Indeed, none was alleged in connection with Foundation funding of the BSCS program. The statute imposes no religious requirements, and the content of funded publications is not subjected to any religious test.

Finally, implementation of the Act does not inhibit the free exercise of religion. Plaintiff alleges no coercion to influence the practice or exercise of his religious beliefs, but alleges only that he must pay taxes which are used to disseminate a theory which is counter to his religious be-

liefs. This is not sufficient to support a claim of inhibition of the free exercise of religion. See *Tilton* v. *Richardson, supra,* 403 U.S. at 689.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JOSEPH D. BUSCHER,
Counsel for the Board of Regents of the University of Colorado.

JANUARY 1975.